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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Renato Ariza Dominguez and Maria Clara)
9 Leonor Rivera Cordero, as surviving parents of)
10 decedent, Francisco Javier Dominguez Rivera,) and as successors in interest,

11 Plaintiffs,

12 v.

13 Nichols William Corbett,

14 Defendant,

CV 08-648 TUC DCB (BPV)

15 Renato Ariza Dominguez, individually as the)
16 surviving Father of Francisco Javier Dominguez,) and as Successor-in-Interest to the Estate of) Francisco Javier, et al.,

17 Plaintiffs,

18 v.

19 United States of America, et. al.,

20 Defendants.

CV 09-474 TUC DCB (BPV)

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22 **O R D E R**
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21 This matter was referred to Magistrate Judge Bernardo P. Velasco on September 11,
22 2009, pursuant to Rules of Practice for the United States District Court, District of Arizona
23 (Local Rules), Rule (Civil) 72.1(a). On August 5, 2010, Magistrate Judge Velasco issued a
24 Report and Recommendation (R&R). (Doc. 36.) He recommended granting Defendants
25 Motion to Dismiss Portions of the First Amended Complaint with leave to amend in part and
26 without leave to amend in part. (Doc. 23.) He recommended denying, with leave to re-urge it,
27 the Defendants' Motion to Strike Portions of the First Amended Complaint. (Doc. 23.) The
28 Court accepts and adopts the Magistrate Judge's R&R as the findings of fact and conclusions

1 of law of this Court and grants in part and denies in part the motion to dismiss and strike
2 portions of the First Amended Complaint. (Doc. 23.).

3 STANDARD OF REVIEW

4 The duties of the district court, when reviewing a Report and Recommendation of a
5 Magistrate Judge, are set forth in Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C.
6 § 636(b)(1). The district court may “accept, reject, or modify, in whole or in part, the findings
7 or recommendations made by the magistrate judge.” Fed.R.Civ.P. 72(b), 28 U.S.C. § 636(b)(1).
8 When the parties object to a R&R, “[a] judge of the [district] court shall make a *de novo*
9 determination of those portions of the [R&R] to which objection is made.” 28 U.S.C. §
10 636(b)(1); Fed. R. Civ. P. 72(b); *see Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). When no
11 objections are filed, the district court does not need to review the R&R *de novo*. *Wang v.*
12 *Masaitis*, 416 F.3d 992, 1000 n. 13 (9th Cir.2005); *United States v. Reyna-Tapia*, 328 F.3d 1114,
13 1121-22 (9th Cir.2003) (en banc).

14 The parties were sent copies of the R&R and instructed they had 14 days to file written
15 objections. 28 U.S.C. § 636(b), *see also*, Federal Rule of Criminal Procedure 72 (party objecting
16 to the recommended disposition has fourteen (14) days to file specific, written objections). To
17 date, no objections have been filed. The Government filed a Notice of non-objection with a
18 reservation of rights as to the R&R that under the Federal Tort Claim Act (FTCA) a claim may
19 be based on allegations that “policy-making defendants promulgated policies and practices
20 condoning misconduct, criminal activity and constitutional violations.” (R&R at 19.) These
21 allegations are being dismissed, without prejudice.

22 REPORT AND RECOMMENDATION

23 These consolidated cases arise from a shooting by Defendant Nicholas Corbett, a Border
24 Patrol Agent, during the apprehension of several individuals for illegally crossing the Mexico-
25 United States border, which killed Francisco Javier Dominguez Rivera (Dominguez). Plaintiffs
26 filed a *Bivens* claim against Defendants alleging constitutional violations in CV 08-648 TUC
27 DCB. Plaintiffs filed tort claims against Defendants under the FTCA in CV 09-474 TUC DCB.
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1 Plaintiffs' Second Claim alleged in the FTCA Amended Complaint is for negligence.
2 Defendants argue this claim fails, pursuant to Fed. R. Civ. P. R.12(b)(6), because it is conclusory
3 and devoid of any well pled factual allegations to raise a plausible claim. The Magistrate Judge
4 found the factual allegations sufficient to establish what the claim is, but found the FTCA
5 Amended Complaint fails under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and
6 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) because it does not permit the court to infer more
7 than the mere possibility of misconduct. The Magistrate Judge recommended granting the
8 motion to dismiss the Second Claim in the FTCA Amended Complaint with leave to amend it.
9 (R&R at 6-10.)

10 The Third Claim in the FTCA Amended Complaint alleges that the employees of the
11 federal government had a duty to use appropriate procedures in the hiring, retention, and
12 supervision of Border Patrol Agent Corbett. Defendants challenged this claim as an untimely
13 *Bivens* claim against supervisors and that constitutional tort claims are precluded under the
14 FTCA. As alleged, the claim fails to name any individual employee, who acting within the
15 scope of their employment, committed a tort against Plaintiffs, but Plaintiffs argue this is because
16 the specific United States employees true identities are unknown at this time. The Magistrate
17 Judge recognized that the FTCA does not support claims based directly on constitutional
18 violations, and that generally negligent supervision claims fall within the discretionary function
19 exception to the FTCA. (R&R at 12.) The Magistrate Judge recommended dismissing with
20 prejudice this part of the Third Claim. The Magistrate Judge, however, noted that negligent
21 supervision will not be considered discretionary where it promotes illegal or unconstitutional
22 conduct. *Id.* at 12-13. As to this part of the Third Claim, the Magistrate Judge recommended it
23 be dismissed for failure to allege a sufficient factual basis to raise it as a plausible claim, but that
24 dismissal be without prejudice to amendment. *Id.* at 13-14.

25 The Second Claim in the *Bivens* Amended Complaint alleged supervisory responsibility
26 for violations of Plaintiffs' civil rights under color of law. Recognizing that there can be no
27 vicarious liability under *Bivens*, the Magistrate Judge noted that "a plaintiff must plead that each
28 Government-official defendant, through the official's own individual actions, has violated the

1 Constitution.” (R&R at 16) (citing *Iqbal*, 129 S. Ct. at 1948). Again, the Magistrate Judge
2 found that, here, the Plaintiff failed to sufficiently state facts to support such a case. Specifically,
3 the *Bivens* Amended Complaint fails to name “any individual supervisory official, it fails to
4 identify how the actions of individual officials could foreseeably have caused the violations
5 alleged in the complaint.” (R&R at 17.) The Magistrate Judge recommended dismissing this
6 claim with prejudice because it is barred by the statute of limitations. Relation back provisions,
7 Fed. R. Civ. P. R.15(c)(2), will not allow Plaintiffs to add supervisors, individually, as they
8 become known because it applies only to actions against the United States or its officers or
9 agencies when sued in their official capacities. *Id.* at 17.

10 The Magistrate Judge recommended denying as moot the Defendants’ Motion to Strike
11 portions of the amended complaints as being impertinent and scandalous, and because the
12 allegations would create the potential for unfair prejudice against the United States. He
13 recommended the Motion to Strike be denied, without prejudice to it being reurged subsequent
14 to any amendments to the pleadings.

15 Pursuant to 28 U.S.C. § 636(b), this Court makes a *de novo* determination as to those
16 portions of the R&R to which there are objections. 28 U.S.C. § 636(b)(1) (“A judge of the court
17 shall make a de novo determination of those portions of the report or specified proposed findings
18 and recommendations to which objection is made.”) To the extent that no objection has been
19 made, arguments to the contrary have been waived. *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th
20 Cir. 1980) (failure to object to Magistrate’s report waives right to do so on appeal); *see also*,
21 Advisory Committee Notes to Fed. R. Civ. P. 72 (citing *Campbell v. United States Dist. Court*,
22 501 F.2d 196, 206 (9th Cir. 1974) (when no timely objection is filed, the court need only satisfy
23 itself that there is no clear error on the face of the record in order to accept the recommendation).

24 While there are no objections and review has, therefore, been waived, the Court
25 nevertheless reviews at a minimum, *de novo*, the Magistrate Judge’s conclusions of law.
26 *Robbins v. Carey*, 481 F.3d 1143, 1147 (9th Cir. 2007) (citing *Turner v. Duncan*, 158 F.3d 449,
27 455 (9th Cir. 1998) (conclusions of law by a magistrate judge reviewed *de novo*); *Martinez v.*
28 *Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991) (failure to object standing alone will not ordinarily

1 waive question of law, but is a factor in considering the propriety of finding waiver)). The Court
2 finds the R&R to be thorough and well-reasoned, without any clear error in law or fact. *United*
3 *States v. Remsing*, 874 F.2d 614, 617-618 (9th Cir. 1989). The Court accepts and adopts the
4 R&R as the opinion of the Court, pursuant to 28 U.S.C. § 636(b)(1). For the reasons stated in
5 the R&R, the Court grants in part and denies in part the Defendants Motion to Dismiss and
6 Strike Portions of the Amended Complaints (doc. 23).

7 **Accordingly,**

8 **IT IS ORDERED** that the Report and Recommendation (doc. # 36) is adopted as the
9 opinion of the Court.


10 **IT IS FURTHER ORDERED** that Motion to Dismiss (doc. 23) be granted in part, as
11 follows: 1) FTCA Amended Complaint, Second Claim, without prejudice; 2) FTCA Amended
12 Complaint, Third Claim, with prejudice as to allegations of constitutional torts, and without
13 prejudice as to allegations that policy-making defendants promulgated policies and practices
14 condoning misconduct, criminal activity and constitutional violations, and 3) *Bivens* Amended
15 Complaint, Second Claim, with prejudice.

16 **IT IS FURTHER ORDERED** that the Motion to Strike (doc. 23) is DENIED, without
17 prejudice to it being reurged subsequent to any amendment.

18 **IT IS FURTHER ORDERED** that the Motion to Dismiss and Motion to Strike Portions
19 of the [Original] Complaint (doc. 20) is DENIED AS MOOT.

20 **IT IS FURTHER ORDERED** that this matter remains referred to Magistrate Judge
21 Glenda E. Edmonds for all pretrial proceedings and Report and Recommendation in accordance
22 with the provisions of 28 U.S.C. § 636(b)(1) and the Rules of Practice for the United States
23 District Court, District of Arizona (Local Rules), Rules (Civil) 72.1.

24 DATED this 8th day of September, 2010.

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27 David C. Bury
28 United States District Judge